United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7379

ORIGINAL

To be argued by

In The

United States Court of Appeals

For The Second Circuit

SILVER CREATIONS, LTD.,

Appellee,

vs.

CLASSIC MASTERPIECES, a subsidiary of STONE FILMS INTERNATIONAL, INC.,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

B

P/S

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SILVER CREATIONS, LTD.,

Appellee,

- against -

CLASSIC MASTERPIECES, a Subsidiary of STONE FILMS INTERNATIONAL, INC.,

Appellant.

BRIEF ON BEHALF OF APPELLEE

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Owen, J.) awarding damages for breach of contract to plaintiff in the amount of $61,300.00 with interest thereon from July 8, 1974. The judgment was entered on April 24, 1975 and defendant's motion for new trial was denied on June 4, 1975. The decision of the Court below was delivered orally from the bench (J.A. 116 - J.A. 120) and is not officially reported.

Statement of the Case

This is a suit for breach of contract in which the execution and validity of the contract was not contested; rather, the defense offered was that, in performance of the contract, time was of the essence and plaintiff had not performed within the time required by the contract (see defendant's Answer, J.A. 5 - J.A. 6). The Court below found, on findings which are not contested on this appeal (see Appellant's Brief, Page 2), that time was <u>not</u> the essence of the contract and that, even if it were, defendant had waived the time of the essence provision. Thus, Judge Owen found (J.A. 118):

> "I thus find and conclude that the defendant did not consider time to be of the essence of this contract, and that was not a basis of refusal to take the merchandise, but, on the contrary, for one reason or another, I find that the defendant's ardor in desiring these articles to sell had cooled and that they therefore didn't want them."

The Court further found (J.A. 119):

> "Even if time were of the essence - and I do not find it to be here - since these brochures were printed in February and that there were four months of negotiating over this contract, even were time of the essence, I find that the plaintiff was ready to perform on July 8th, which was a Monday, the last day for performance being the prior Saturday, and I find that the defendants waived this right, in every event."

Appellant has stated that these findings are not being contested on this appeal (Brief for Appellants, Page 2) and,

therefore, it is not necessary to recite the testimony upon which they were based. It would appear that the only basis for the appeal is the appellant's objection to the Court below's proceeding to make these findings and entering judgment against appellant at an earlier date than appellant would have wished. Appellant's only argument on this appeal is that the trial judge erred in refusing to recuse himself or grant an adjournment of the trial. Appellants do not claim that there was any error in the decision rendered by the Court below.

The facts relating to the motion to recuse and for an adjournment are as follows:

This action was instituted on September 5, 1974. After issue was joined, defendant noticed plaintiff's deposition, and plaintiff cross-noticed the deposition of defendant's officers and owners, Tobias Stone and Janice Stone. The deposition of plaintiff, by its Vice President, Richard Moskow, was held on December 18, 1974. The deposition of Tobias Stone was supposed to have been taken on the same date, but he failed to appear. The reason given was that he had been involved in an accident that day.

Counsel for plaintiff then asked counsel for defendant to set a firm date on which Mr. and Mrs. Stone would appear. Counsel for defendant replied that he could not guarantee the attendance of his clients on any particular date. Accordingly,

it was necessary for plaintiff to file a motion to compel the appearance of Mr. and Mrs. Stone for oral examination. It was only after an order was entered on this motion, and then only on the last day that they could appear for oral examination without being in violation of the terms of the order, that Mr. and Mrs. Stone appeared for their oral deposition.

After discovery was completed, counsel for plaintiff requested an early trial date because of the dire financial need of the appellee. This application was by letter to Judge Owen with a copy sent to counsel for appellant (see J.A. 10 - J.A. 11).

In response to the request of counsel for appellee, Judge Owen originally agreed to hear the case on March 28, 1975. This hearing date was adjourned at the request of counsel for defendant until April 14, 1975. Counsel for appellant was advised that this was to be a firm trial date.

Appellant then filed a motion to have Judge Owen disqualify himself. On April 7, 1975, Judge Owen denied this application stating, "Treating this as a motion to recuse, in my judgment it is frivolous and is hereby denied."

Notwithstanding denial of this motion, counsel for appellant came into Court on April 14, 1975 stating that they were not prepared to go to trial on that date because they had

assumed that that was the date on which argument was to be heard on their motion to disqualify Judge Owen. Thus, the following statement was made by counsel for appellant prior to the commencement of the trial on July 14, 1975 (J.A. 21 - J.A. 22):

> "When I first spoke to Mr. Sudler (Judge Owen's law clerk), which was prior to the time I sent in the papers, he said to me at that time, 'Understand that this will be a firm trial date.' When I wrote the letter, it occurred to me that to make this come through protocol only to face a re-assignment would be unfair. I did expect and had no reason to believe otherwise that the 14th was going to be the date on which we were going to receive a decision on that motion. The first I learned otherwise was I think Thursday, when I spoke to Mr. Sudler. At that time we had received a card in the mail and immediately sent someone down to court to find out what the result was. But as of last Thursday, or at least up until Thursday morning, we had no reason to believe that the application for adjournment would not be considered, because we had not heard anything from your chambers.
>
> "Under the circumstances, our clients, both of them, asked us what do we do? I said, 'Well, it just seems to me Mr. Stone had advised that he had to be in some other place.' I don't even know where he is. I have attempted to reach him, I believe, last Thursday.
>
> "In fact, in my letter, which I have here, I told him should he receive it he could reach me at home and gave him my home phone and Mr. Koenig's home phone number. Neither of us heard from him. So I think that puts it perhaps into perspective.
>
> "THE COURT: Except I am also troubled by this fact: if you knew that today is a firm trial date, your clients have a duty to keep in touch with you, and they just can't be disappearing into silver mines, smiling at the United States District Court by reason of unavailability."

The trial then proceeded with the testimony of the plaintiffs

being taken on April 14, 1975 and, on April 15, 1975, portions of the depositions of Mr. and Mrs. Stone were read into evidence for the defendant. With respect to the defendant's continued renewal of its application for an adjournment, Judge Owen stated (J.A. 87 - J.A. 90):

> "THE COURT: Before we start the reading, I want to rule on Mr. Koenig's motions.
>
> "First, I am going to deny the request for an adjournment. I want to state in one place and at one time that this trial date had been set somewhere in the third week of March. As I remember, I received a letter from plaintiff's counsel -- and I will come to that in connection with the motion for mistrial that you made. When I received that letter, which I regarded in the nature of an application for preference, really, given the circumstances brought to my attention having nothing to do with how any trier of the fact, particularly myself, would rule on the merits -- when I got that letter I endeavored to see if I could work in counsel on the morning of Good Friday or Passover, because of the representation to me that the case would take less than a day to try. That date was unsatisfactory, as I recall, for religious reasons, and therefore, in the third week of March I set April 14th, which was yesterday, for trial as a firm date.
>
> "Following that time, we got the motion for me to recuse myself, which I regarded then, as I regard now, as wholly without merit. I am advised that my law clerks, in speaking to various parties, announced at that time that in the event that the motion was denied, the trial date of April 14th would stand.
>
> " It is acknowledged here as of yesterday that as of last Thursday, April 10th, everybody knew that the motion had been denied and that the trial date of April 14th was the date, and I

have nevertheless, in order to make sure that defendant had ample opportunity to come in, given one extra day.

"That is the end.

"I will note this as against a history of difficulty and requisition the interpretation of a magistrate to report with regard to getting the defendants to testify at their depositions.

"A reasonable man could conclude that this nonappearance by the defendants here, putting the burden on counsel to try to get more time for them, is cut from the same piece of cloth. That application is therefore denied.

"With regard to the motion for a mistrial, I regarded that, as I said when it was made, as without merit. Trial judges in this court and in all courts have the task in many a case of seeing if cases can be disposed of. They have pre-trial conferences, at which all kinds of things are said to them, and one of the jobs of a United States District Judge, indeed, if not all judges, is when sitting non-jury to put from his mind anything that has nothing to do with the merits of the case and, when trying the case on the merits, pay attention solely to the merits.

"I have done that. I am doing that to the best of my ability. Anything having to do with the reason for granting this case a preference in no way enters into any conclusion I should reach on the merits of the case heard before me. This case will be decided solely on the evidence heard in this courtroom, presented by the parties.

"Given that, also, Mr. Koenig remarked that the trial date had been set here without any opportunity to be heard on it. That just isn't so, because when the 29th of March, Passover or Good Friday was an inappropriate date for the parties, all the parties concurred at that

time on April 14th.

"So they were heard in the setting of yesterday as a trial date. So that motion is denied."

Argument

POINT I. APPELLANTS HAVE ADVANCED NO REASON WHICH WOULD WARRANT SETTING ASIDE THE DECISION OF THE COURT BELOW

Counsel for appellant have stated at Page 2 of their Brief that they are not contesting the validity of the contract or the Court below's decision on the time of the essence defense. Since appellant is not challenging the merits of the decision below, there really is nothing to be determined on this appeal. Apparently, appellant's only protest is that the Court proceeded to render that judgment on the merits at an earlier date than appellant would have wished, and is attempting to use, as an excuse, that their clients were not available at the trial. However, nowhere does appellant suggest what testimony, other than the testimony offered by deposition, would have been offered by Mr. and Mrs. Stone if they had been available at the trial which would in any way have changed the merits of the decision. There being no showing that the evidence would have been any different had Mr. or Mrs. Stone been available to testify, the question of whether the Court below erred in denying the requested adjournment is moot as well as being unmeritorious.

We submit that Judge Owen correctly recognized the situation for what it was, an effort to stall and delay, and nothing else. He correctly rejected this tactic.

Conclusion

For all the foregoing reasons it is respectfully submitted that the decision below should be affirmed, and that damages and double costs should be awarded to appellee under Fed. R. App. P. 38 on the grounds that the within appeal is frivolous.

Respectfully submitted,

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Attorney for Appellee
346 West 17th Street
New York, New York 10011

Of Counsel:

Charles Sovel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SILVER CREATIONS LTD., Appellee, against CLASSIC MASTERPIECES, etc., Appellant	Index No. Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

James A. Steele being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 310 W. 146th St., New York, N. Y.

That on the 25th day of August 1975 at 60 East 42d Street, N.Y., N.Y.

deponent served the annexed Appellee Brief upon

Koenig Ratner & Mott

the Attorneys in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

James Steele

Print name beneath signature

JAMES A. STEELE

Sworn to before me, this 25th day of August 19 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977